STATE OF MICHIGAN

IN THE SUPREME COURT

GERARD J. WIATER,

Plaintiff/Appellee

v.

GREAT LAKES RECOVERY CENTERS, INC.,

Defendant/Appellant

Supreme Court No. _____
Court of Appeals No. 250384 COA 1-27-05
Lower Court No. 03-40316-NO
Marquette
J. Weber

Robert T. Finkbeiner (P13433)
Robert T. Finkbeiner, P.C.
Attorneys for Plaintiff/Appellee
1229 W. Washington St.
Marquette, MI 49855
(906) 228-2800

Michael G. Summers (P27241)
Bensinger, Cotant & Menkes, P.C.
Attorneys for Defendant/Appellant
122 W. Bluff St.
Marquette, MI 49855
(906) 225-1000

128139

DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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Michael G. Summers
Attorney for Defendant/Appellant
122 W. Bluff Street
Marquette, MI 49855
(906) 225-1000

Dated: March 2, 2005

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STATEMENT OF JUDGMENT

This is an Application for Leave to Appeal the decision of the Michigan Court of Appeals dated January 27, 2005, No. 250384, reversing the decision granting Defendant/Appellant's Motion for Summary Disposition to by the Circuit Court for the County of Marquette, 25th Judicial Circuit. [Exhibit F.]

RELIEF REQUESTED

The Defendant/Appellant and Applicant, Great Lakes Recovery Centers, Inc., requests this Court grant its Application for Leave to Appeal, and upon hearing this Appeal, reverse the decision of the Court of Appeals and reinstate the relief granted by the 25th Judicial Circuit Court.

STATEMENT OF QUESTIONS PRESENTED

I.

AT THE TIME OF THE SLIP AND FALL, WAS PLAINTIFF/APPELLEE AN "INVITEE" OF DEENDANT?

Defendant/Applicant and Appellant, Great Lakes Recovery Centers, Inc., answers: "No."

Plaintiff/Appellee, Gerard Waiter, answers that he is one or the other and that it makes no material difference which for purpose of his cause of action.

The Trial Court answered: "No."

The Court of Appeals answered: "Yes."

II.

WAS THE DEFENDANT'S ICY PARKING LOT EFFECTIVELY UNAVOIDABLE AND PRESENTING AN UNREASONABLE RISK OF SEVERE HARM THAT DEFENDANT KNEW OR SHOULD HAVE KNOWN EXISTED SUCH THAT A FACT ISSUE WAS CREATED AS TO WHETHER OR NOT A "SPECIAL ASPECT" EXISTED TO OVERCOME THE OPEN AND OBVIOUS DOCTRINE?

Defendant/Applicant and Appellant, Great Lakes Recovery Centers, Inc., answers: "No."

Plaintiff/Appellee, Gerard Wiater, answers: "Yes."

The Trial Court answered: "No."

The Court of Appeals answered" "Yes."

III.

DID OPEN AND OBVIOUS ICE ON A PARKING LOT ALONE CREATE A FACT QUESTION OF "SPECIAL ASPECT"?

Defendant/Applicant and Appellant, Great Lakes Recovery Centers, Inc. answers: "No."

Plaintiff/Appellee, Gerard Wiater, answers: "Yes."

The Trial Court answered: "No."

The Court of Appeals answered" "Yes."

GROUNDS FOR APPLICATION

Slip and falls are a prominent feature of Michigan litigation and personal injury claims. This case involves a sub-category of that litigation being slips and falls caused by ice or snow conditions and particularly, here, in a parking lot. Michigan law has evolved in this area since the reinvigoration of the Open and Obvious doctrine with subsequent decisions by both the Court of Appeals and Michigan Supreme Court. The law has also developed and been further refined by principles or concepts related to liability under the Open and Obvious doctrine involving "special aspects," or unique conditions and "special circumstances." The consistent application of these principles or rules in litigation, and the grounds for litigation, is critical. Predictability and reliability in the law is essential.

The Court of Appeals' decision in the instant action, *Wiater v Great Lakes Recovery Centers, Inc.* is important for a number of reasons. First and foremost, the Court of Appeals seems to have deviated substantially from recent Michigan Supreme Court cases of *Lugo v Ameritech Corp., Inc.*, 464 Mich 512; 629 NW2d 384 (2001) and *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; 614 NW2d 88 (2000), as well as Court of Appeals' decisions particularly in *Joyce v Ruben*, 249 Mich App 231; 642 NW2d 360 (2002) and *Corey v Davenport College of Business*, 251 Mich App 1; 649 NW2d 392 (2002).

In essence, the Court of Appeals appears to be saying that a naturally created icy condition in any parking lot during winter months on its own may be a "special aspect" to avoid Summary Disposition. The use, therefore, of a parking lot by a visitor, despite its open and obvious condition is "effectively unavoidable," hence overcoming the bar on liability under the Open and Obvious doctrine. The Court of Appeals' decision is clearly in error and substantially in conflict with the above cited Supreme Court decisions.

Furthermore, the Court of Appeals' decision creates confusion in the relationship between the Open and Obvious doctrine and what are "special aspects." The development of the law, including the Supreme Court decisions in this area of the law, have been pointedly decided for the purpose of clarifying the law. This particular decision, though unpublished by the Court of Appeals, has been featured prominently in a legal publication with statewide circulation amongst attorneys. The suggestion is current that there may be a significant swing favoring these claims and liberalizing the necessary standards of proof as a direct consequence of this decision.

The impact of this holding encompasses every parking lot and therefore the potential liability of every owner or possessor. If the Court of Appeals' decision is meant to say that ice alone on any parking lot is "effectively unavoidable," or presents a high order of risk, that is, of serious injury or death arising out of a slip and fall, this represents a significant shift in Michigan law.

The Court of Appeals also found that the visitor to these premises, Mr. Wiater, was an "invitee" though no facts were presented showing that his visit was directly or indirectly associated with a business or commercial purpose of the parking lot owner. This despite the relative recent decision in *Stitt* by the Michigan Supreme Court carefully defining the common law categories of land users and visitors. The Court of Appeals also seems to have concluded that an occupier or tenant of the property owner may, by invitation, create invitee status to a visitor who arrives merely to provide services directly to the occupant or tenant detached from any business purpose of the owner. Furthermore, the tenant or occupier's relationship with the landowner may be interpreted to be for business or commercial purpose and that purpose then transferred to the visitor to confer invitee status.

In sum, the decision by the Court of Appeals is of major significance concerning prominent features and principles of law that need clarification or resolution by the Michigan Supreme Court. The decision, furthermore, has received considerable attention, interest and concern amongst the personal injury bar. The Michigan Supreme Court also has the opportunity to lay to rest the viability, and continuing applicability of what is commonly called the Natural Accumulation doctrine involving slip and falls on ice and snow on private, as opposed to public property.

I.

STATEMENT OF FACTS

This case arises out of a fall in Defendant's parking lot on March 6, 2001. Plaintiff, Gerard Wiater, contends that the fall was caused by "a mixture of ice and snow." See Complaint, paragraph 8. The parking lot and building are depicted in photographs attached as Exhibits A.

The Plaintiff was, at the time of the accident, an employee of the local Salvation Army. [Wiater deposition Page 8, hereafter W. dep., p. 8.]. His primary employment duty was to review or screen requests for benefits and assistance such as food, clothing, shelter. [W. dep., p. 10].

The Defendant, Great Lakes Recovery Centers, Inc. (hereafter GLR), through its employees, staff and professionals, extend counseling and treatment, as well as rehabilitation primarily the result of drug or alcohol abuse. [Exhibit B]. Clients are referred from a number of sources. Defendant also operates an in-patient, residential unit in the city of Marquette, located at 241 Wright Street. That is the site of the accident.

A federal parolee by the name of Lynn LaVictor resided at Defendant's residential unit. Under contract with the Federal Bureau of Prisons, the GLR residential unit operated as something akin to a "halfway house" where Mr. LaVictor fulfilled his probation requirements and received food, shelter and counseling.

Beginning in November of 2000, Mr. Wiater from time to time provided transportation from the residential unit to the Salvation Army business office located at 1990 W. Baraga Avenue for Mr. LaVictor. [LaVictor dep., pp. 4-7, hereafter L. dep., p]. He had obtained employment with the Salvation Army as a "maintenance man" while on parole. [L. dep., p. 6].

Employment is entirely a matter of personal choice, it is outside GLR's contract services. If a resident obtains employment, GLR monitors the resident's schedule as well as his or her comings and goings for security purposes. GLR's contract with the Federal Bureau of Prisons also requires that it collect on behalf of the Bureau, twenty-five percent of the resident's employment income, account for the same and forward the entire amount to the Bureau. No fees, or any portion of the income is retained by GLR. The Federal Bureau of Prisons uses the twenty-five percent as an offset of its cost. [Exhibit D].

The residential unit is not open and available to the public, since no public business is carried on there. Nor is there any solicitation or invitations to the public to visit and engage in business for any commercial benefit to Great Lakes Recovery. [Exhibit D]. The unit is not open to the public since the building is required to maintain security and confidentiality with respect to its occupants. [Exhibit D.] No direct, or indirect, financial, pecuniary, business or commercial benefit of any kind was received by GLR as a consequence of Plaintiff Gerard Wiater's visits to the residential unit for the purpose of providing transportation to Lynn LaVictor.

On March 6, Plaintiff arrived at GLR between 8:00 and 8:30 a.m. to pick up Mr. LaVictor. [W. dep., pp. 23-24; L. dep., pp. 41-43; W. dep., pp. 48-49]. Mr. Wiater drew an overhead schematic of the Great Lakes Recovery building and parking lot, as well as his route to and from his van. [See Exhibit C]. Mr. Wiater testified as to what he could and could not remember upon arrival:

Q: Okay. When you pulled in that morning, March 6th, 2001, what, if anything, did you note about the parking lot and anything on the surface of that parking lot?
A: Nothing that I can remember, nothing that -- nothing --
Q: Was there any snow or ice in the parking area?
A: Well, there *was snow and ice all over that time of year*, but I don't recall -- didn't particularly note something or try to remember it. I don't know.

Q: Was the parking area of the Salvation Army building covered with snow or ice that morning?
A: I don't remember.
Q: Do you know whether it had snowed or we had freezing rain or anything prior to you going to the Great Lakes Recovery Center parking lot?
A: No. I remember that part of that spring that it was a snowy spring it seemed like. But I don't recall -- I just don't remember.
Q: Was the parking lot cleared? That is, had it been plowed?
A: There was *no snow piles on it, that's for sure.* There was no -- yes, it -- well, there were no, *like, fresh snow that a plow hadn't gotten to.* I don't remember that." [W. dep., pp. 51-52]. [Italics added].

Plaintiff has contended that the route taken by Plaintiff into and out of the building was the only one available for use citing Mr. LaVictor's testimony at pages 22 and 23 of his deposition. Mr. LaVictor, however, has never testified that Mr. Wiater's route was the only one available, nor the only parking lot from which to gain access to the building. All Mr. LaVictor testified to was that the door adjacent to the parking area was a fire exit and not used for entry. No testimony was produced by Plaintiff that there were no other parking areas or routes to the entry door.

Mr. Wiater identified nothing, at least that he could recollect on the morning of the fall, that was unusual about the surface of the parking lot with the exception that it was "flat." [W. dep., p. 54]. Nothing caused him to be apprehensive of any hazard while crossing the parking area. [W. dep., p. 54]. He conceded, based upon 13 years experience, that ice and snow in parking lots is not unusual in this area. That was common in the Upper Peninsula of Michigan. [W. dep., pp. 24-25]. He was entirely familiar with this parking lot as a result of numerous visits over the winter months to pick up Mr. LaVictor and return him after work. [W. dep., pp.22-23.]

Plaintiff parked his vehicle (van), proceeded across the parking lot to the sidewalk and along the side of the building to the GLR office. [W. dep., pp. 49-51]. The route taken is nearly identical with his return course. [Exhibit C; W. dep., p. 57].

Mr. Wiater identified no business or commercial relationship of any kind between GLR and the Salvation Army, nor did he articulate any business purpose with GLR related to his visit. The entire purpose was to pick up Mr. LaVictor for his employment as he had done several times before [L. dep., p. 40] [W. dep., p. 56]. [Exhibit B]. The transportation to and from the Residential unit was a gratuitous or volunteer service extended by the Salvation Army to employees. [W. dep., p. 56].

Mr. LaVictor and Plaintiff walked back to the van together. Mr. Wiater's recollection ends at approximately where he indicates on his drawing. [W. dep., pp. 56-57]. [Exhibit C]. That is, he has no recall after he approached the driver's side door. He does not remember anything "odd or unusual" on the route back to the van. [W. dep., pp. 58-59]. He does say he was walking carefully, as was his habit in the wintertime, meaning taking short steps. [W. dep., p. 59]. He and Mr. LaVictor were carrying on a conversation. [W. dep., p. 59].

At some point the two split their route with Mr. LaVictor going to the passenger side of the vehicle and Mr. Wiater to the driver's side. [L. dep., pp. 44-45]. Plaintiff, according to Mr. LaVictor, opened the door or was in the process of pulling it open when he fell. [L. dep., pp. 20, 32, 44-45]. Although Mr. LaVictor's concluded that Mr. Wiater "slipped and fell on ice," [L. dep., pp. 31, 45], it is clear that what he actually saw was not Plaintiff's feet but his arms go up. [L. dep., pp. 29, 32-33, 50]. There is no question that Mr. Wiater fell backwards, struck his head and was injured. Mr. Wiater says he does not know how he fell. [W. dep., p. 84].

Lynn LaVictor has testified that the entire parking lot, or nearly all of it, was covered with "clear ice." [L. Dep., pp. 21, 24, 35-36, 47-48]. This, so he says, was the result of snow banks melting during the course of the day caused both by the warm temperatures and perhaps salt on the parking lot. [L. Dep., pp. 20-22, 25-26]. In the evening the moisture or "run-off"

would freeze. This occurred the night before. The parking lot had been plowed and was free of snow. [L. dep., pp 13, 19-22, 26]. [Exhibit B]. No testimony was produced to suggest any activities by GLR, its staff, employees or clients having any hand in modifying the condition of the parking lot the morning of the fall after it had been plowed.

Mr. LaVictor did not believe there was enough of a hazard to caution Mr. Wiater in walking across the parking lot. [L. dep., pp. 33-34]. He explained that Mr. Wiater was a grown man and should know that the parking lot was "icy." [L. dep., p. 33]. As a matter of fact, Mr. LaVictor testified he did not even tell *himself* that the parking lot was hazardous. [L. dep., p. 34]. He testified that the ice was clear and observable with nothing odd, or unusual in terms of the condition of the driveway or area of the accident. [L. dep., pp. 35-36, 47-48]. The weather was clear and the sun was out. [L. dep., 46]. The Court of Appeals and the Trial Court concluded the condition was "open and obvious".

Mr. LaVictor says that a week before the present incident he had run out of sidewalk salt. This is presented as proof of negligence on the part of the Defendant in not providing adequate supply. Hence, Mr. Wiater fell. Defendant's proofs, however, show a substantial amount of salt was purchased shortly beforehand (50 pounds) as attested to by Sue Burcar's Affidavit and attached documentation. [Exhibit E].

Following the fall Mr. Wiater was transported to Marquette General Hospital. Thereafter, he filed suit. He alleges that Great Lakes Recovery Centers is liable for his slip and fall because of its failure to exercise reasonable or due care in maintaining the parking lot and keeping it free of ice and snow.

Defendant filed a Motion for Summary Disposition with supporting Brief, Affidavits and other exhibits. Arguments were presented to the Court on July 11, 2003. It is Defendant's

position that Plaintiff was a licensee. Even if he were an "invitee", there was no unreasonably dangerous condition or "special aspect" that would avoid the "open and obvious" doctrine. .

At the conclusion of the hearing and after arguments had been presented, the Trial Court granted Summary Disposition to the Defendant finding that the condition of the parking lot was open and obvious and without "special aspects."

Plaintiff thereafter filed his claim of appeal as a matter of right before the Court of Appeals. On January 27, 2005, by unpublished decision, the Court of Appeals reversed the Trial Court's decision and remanded the case back for further proceeding. The Court held that the condition of the parking lot was open and obvious but concluded Plaintiff was an invitee of the Defendant and hence due a high standard of care. The Court further found that the Trial Court erred by granting Summary of Disposition since a "reasonable person" could conclude that the situation involved "special aspects" which made the condition "unreasonably dangerous" and unavoidable despite the fact that it was open and obvious.

II.

STANDARD OF REVIEW

A trial court's decision on a Motion for Summary Disposition is reviewed by the Supreme Court *de novo* to determine if the moving party is entitled to Judgment as a matter of law. The Court in making that determination reviews the entire record to determine whether or not the Defendant/Appellant was entitled to Summary Disposition. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999).

A Motion for Summary Disposition under MCR 2.116(C)(10) is designed to test whether real factual support exists for the claim. It must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G(3)(b); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The moving party must identify the undisputed factual issues and the trial court must consider the submitted documentary evidence in the light most favorable to the non-moving party. *Maiden, supra.* If the moving party fulfills its initial burden, the party opposing the motion must demonstrate with evidentiary materials that a genuine and material issue of disputed fact exists. *Spiek, supra.* If no dispute exists regarding a fact material to the disposition of the legal claim, the moving party is entitled to judgment as a matter of law and summary disposition was properly granted. *Maiden, supra.*

The Michigan Supreme Court noted in *Moll v Abbott Laboratories*, 444 Mich 1, 26; 506 NW2d 816 (1993),

> "We have long recognized that a jury is charged with resolving disputed facts. However, '[b]efore a jury is ever reached a preliminary decision must always be made, namely, whether or not there is anything to go to the jury.' Where the facts of a case are uncontroverted and the only question left is what legal conclusions can be drawn from the facts, the question is for the court and not the jury." [Citations omitted].

In this case, there was no genuine issue of material fact precluding the Trial Court from granting Summary Disposition in favor of Defendant/Appellant Great Lakes Recovery Centers, Inc. The Trial Court's ruling should be affirmed upon *de novo* review by this Court.

III.

ARGUMENT AND AUTHORITY

The Court of Appeals erred in concluding that Plaintiff was an "invitee" and that Defendant's parking lot was effectively unavoidable and thus may have presented an unreasonable risk of severe harm that should have been anticipated by Defendant.

a. Plaintiff's status -- invitee or licensee

The Michigan Supreme Court in *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; 614 NW2d 88 (2000), held that the analysis of liability in premises cases commences with a determination of Plaintiff's status. The Court restated the traditional "common-law categories" of persons entering upon land. A visitor may be a trespasser, licensee or invitee. See also Michigan Model Civil Jury Instructions 19.01 et seq. A primary purpose of the *Stitt* decision was to take a historical review of status, restate the law and resolve contrasting and conflicting decisions. This now provides definitions applicable to the present action.

It is the defense position that Plaintiff was a licensee and not an invitee. Even if Plaintiff were an invitee the applicable law and undisputed facts would still bar recovery under the "open and obvious" doctrine.

The Trial Court, to the extent that status was important to the decision, stated that it:

> "..would be inclined to find Plaintiff a licensee since the testimony and, in particular, the affidavit of Bruce Suardini, did not indicate the Defendant's facility was held open to the Plaintiff for a commercial purpose, as required for invitee status in *Stitt v Holland*, 462 Mich 591, 2000." [Hearing Transcript, pp. 50-51].

The Court of Appeals found the condition of the parking lot (ice) was open and obvious. On the other hand, the Court concluded that "...under the undisputed facts of this case, Plaintiff was an invitee of the Defendant at the time of the accident." Plaintiff was equivocal on this question. In his Complaint Plaintiff contended that he was "an invitee and/or a licensee." In fact, Plaintiff's counsel, argued to the Trial Court that his research and review concluded "...that it essentially does not matter whether he was an invitee or a licensee". [Hearing Transcript on Oral Argument, p. 19]. Furthermore, Plaintiff asserts under *Stitt, Supra*, p. 604, that Plaintiff need only show that Defendant's parking area was held open for a "commercial purpose" and need not establish that Plaintiff "...was there for the benefit of that commercial purpose." Plaintiff therefore produced next to nothing for the purpose of showing that Mr. Wiater's visit to the GLR premises had a direct commercial or business tie and purpose.

The reason, of course, that status matters so to speak, is that they are due distinctly different standards of care. As a general proposition of law, a landowner has a duty to exercise reasonable care to protect an invitee from *unreasonable* risk of harm caused by a dangerous condition on his or her land. *Corey v Davenport College of Business*, 251 Mich App 1; 649 NW2d 392 (2002). Such a landowner, however, does not have a duty to remove "open and obvious" dangers if an invitee knows or reasonably can be expected to discover the condition for himself.

The Michigan Supreme Court in *Riddle v McClouth Steel Products Corp.*, 440 Mich 85; 485 NW2d 676 (1992), held that the threshold issue in negligence cases, being duty of care, is to be decided by the Trial Court as a matter of law. The Court must determine whether or not there

is a duty flowing from the Defendant (landowner) to a Plaintiff in actions arising out of slip and falls. An action in negligence may be maintained only if there exist a legal duty to protect others from unreasonable risks of harm. *Burnett v Bruner*, 247 Mich App 365; 636 NW2d 773 (2001) lv den, 466 Mich 875; 676 NW2d 615 (2002).

The Court in *Burnett* reversed the Trial Court's charge based on both the Standard Jury Instructions and Michigan Model Civil Jury Instructions concerning possessor's duty to a licensee. The Court of Appeals found that the instruction did not comport with Michigan law concerning duties owed a licensee:

> "In summary, we hold that a landowner owes his licensee a duty only to warn of hidden dangers the landowner knows or has reason to know of, and only if the licensee does not know or have reason to know of the dangers involved. The landowner does not owe the licensee a duty to inspect or repair in order to make the premises safe for the licensee's visit." [Underlining added.]

This, of course, is a much lower obligation than that extended "invitees." It is clear from *Burnett* and *Stitt* that a licensee must accept the premises in the condition that the landowner maintains for his own use. There is no legal obligation that the premises will be prepared for his arrival or use, or that precautions have been made for his safety. Neither a landowner or possessor has a duty to inspect, or discover dangers to a licensee nor repair or correct such hazards. *Burnett, supra*; *Stitt, supra.*

The Court of Appeals in the instant case, applying *Stitt*, conceded that to acquire invitee status, the relative circumstances "must be directly tied to the owner's commercial business interests." To supply that, the Court noted that LaVictor testified that GLR, "took like thirty, forty percent" of his pay from the Salvation Army as "rent". The Court went on to conclude, apparently based on the authority of *Altairi v Alhaj*, 235 Mich App 626; 599 NW2d 537 (1999) that Plaintiff Wiater was also an "invitee" of Defendant because he was a "guest" of Mr.

LaVictor. Furthermore, Mr. Wiater was at the facility to pick up Mr. LaVictor as part of the latter's employment obligation and "clearly" that was part of LaVictor's rehabilitation. This all, somehow and someway, was as the Court said, "directly connected with Defendant's business" and supports the conclusion that Plaintiff Wiater was an "invitee" of GLR.

But, this is only half the story and is entirely focused on Mr. LaVictor's assertion, not that of the Plaintiff. Mr. LaVictor was paying rent, but it was to the Federal Bureau of Prisons, not the Defendant. GLR has an obligation to account for and retain twenty five percent of Mr. LaVictor's employment pay under the contract with the Bureau of Prisons. The entire amount was then forwarded to the Bureau. GLR received nothing, not a penny from Mr. LaVictor in "rent" from employment income. Whether Mr. LaVictor was working or not, effected no financial gain to GLR. [See Exhibit D]. The only consequence, as a matter of fact, is the additional cost and effort by GLR to account for and process that money, as well as monitoring Mr. LaVictor's hours and his comings and going, all of which would not have to be done if he were unemployed.

The Court of Appeals also says that this employment must have been part of Mr. LaVictor's rehabilitation. That may be so, but it is a matter of personal preference and motivation on the part of Mr. LaVictor. No evidence was produced by Plaintiff that this was any part of the rehabilitation (business) compelled on the part of the Federal Bureau of Prisons and contracted for between it and GLR. Nor does this make Plaintiff an invitee since there is no commercial benefit realized by GLR. It was not, despite the Court of Appeals assertion, a direct connection between Defendant's business operation and the Plaintiff's appearance on the premises to provide Mr. LaVictor transportation.

There are, however, other reasons to question the Court's determination of status. The Court seems to be concentrating on Mr. LaVictor's status and relationship with GLR to produce a commercial purpose for Mr. Wiater. In other words, the Court borrowed Mr. LaVictor's supposed business relationship and transferred it to Plaintiff for the purpose of conferring "invitee" status. Whether Mr. LaVictor is an invitee or licensee, however, makes not a wit of difference. The question is the Plaintiff's status; he must have a business relationship and purpose with GLR that induces the visit. Furthermore, the testimony of both of the involved parties, that is Plaintiff and Defendant contradict any such business connection, direct or indirect. [W. dep., p. 56; Defendant's Exhibit D.]

The Court of Appeals says that Mr. LaVictor, by need of transportation, gives "invitee" status to Mr. Wiater as his "guest." This is not in conformity with the Michigan Supreme Court's decision in *Stitt.* The invitation and hence standing must come from the landowner. Mr. Wiater's status as an "invitee," if it exists at all, is by invitation for a "direct" commercial or business purpose from GLR not Mr. LaVictor. And, further to the point, invitation by Mr. LaVictor confers licensee not "invitee" status. *Stitt, supra.* In sum, Mr. Wiater was at the premises exclusively for the benefit of Mr. LaVictor not GLR.

The Court of Appeals' quotation from *Stitt* supporting invitee status is selective. The Supreme Court's decision was an attempt to finally bring reason and consistency to a visitor's status and weed out conflicting Appellate holdings. The Court specifically rejected the proposition that Michigan adopt the "public invitee" concept for premises liability. The Court was very clear as to what is and is not an invitee as distinct from licensee or trespasser. An "invitee" is one who has, from the owner or possessor, received an "invitation," imposing additional duties to make the premises safe for reception of those visitors. The Plaintiff has the

burden of establishing by evidence that he, or she, has received that invitation and hence this status. The Court held:

> "An invitation may be inferred when there is a common interest or mutual advantage, a license when the object is the mere pleasure or benefit of the person using it. '*To come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business with which the occupant of the premises is engaged, or which he permits to be carried on there.* There must be some mutuality of interest in the subject to which the visitor's business relates, although the particular business which is the object of the visit may not be for the benefit of the occupant. The distinction between a visitor who is a mere licensee and one who is on the premises by invitation turns largely on the nature of the business that brings him there, rather than on words or acts of the owner which proceed his coming."
>
> * * *
>
> "...we conclude that the imposition of additional expense and effort by the landowner, requiring the landowner to inspect the premises and make them safe for visitors, must be directly tied to the owner's commercial business interests. It is the owner's desire to foster a commercial advantage by inviting persons to visit the premises that justifies imposition of a higher duty. In short, we conclude that the prospect of pecuniary gain is a sort of quid pro quo for the higher duty of care owed to invitees. Thus, we hold that the owner's reason for inviting persons onto the premises is the primary consideration when determining the visitor's status: In order to establish invitee status, a Plaintiff must show that the premises were held open for a *commercial* purpose."

Despite the Court of Appeals attempt to cast about for some type of commercial or financial connection between GLR and Mr. Wiater, nothing of the kind exists here. GLR offers professional services <u>to clients</u> not the traveling public. The premises are residential. No commercial business operation is carried out and visitors are not invited for any such purpose. This is not a retail store or shop soliciting customers. No benefit of a financial nature was received by GLR as a consequence of arrival or visit of Mr. Wiater. None was expected. Neither was that Mr. Wiater's purpose. He was there for one purpose -- to provide Mr. LaVictor a <u>ride</u> to work. That was the "nature of the business" that brought him there. GLR offered no invitation to Mr. Wiater. He, therefore, cannot be its "invitee."

In the final analysis, there is no commercial business purpose existing between Mr. Wiater and GLR nor "mutuality of interest". The visit by Mr. Wiater is not "directly" tied to any GLR commercial business interest. There is no commercial advantage fostered by Plaintiff's visit to the premises nor, of course, any pecuniary gain expected or derived by the visit. There is no solicitation to Mr. Wiater or the public in general for the purpose of acquiring some commercial benefit by use of this parking lot.

Mr. Wiater was a licensee. It is clear from both the *Stitt* and *Burnett* decision that a licensee must accept the premises in the condition that the landlord maintains for its own use. There is no legal obligation to prepare the premises for the licensee's arrival or use nor do precautions have to be made for his safety. Neither a landowner nor a possessor has the duty to inspect and discover dangers to a licensee nor correct hazards.

b. "Special Aspects"

It has been repeatedly held that the mere occurrence of a slip or fall and subsequent injury, is not proof of liability nor does it support an inference of negligence. *Stefan v White*, 76 Mich App 654; 257 NW2d 206 (1977). See also *Pete v Iron County*, 192 Mich App 687; 481 NW2d 731 (1992). There must some proof of a causal link between the asserted negligence of the owner and the occurrence. The Michigan Supreme Court in *Bertrand v Allan Ford, Inc.*, 449 Mich 606; 537 NW2d 185 (1995), the Court held that a business invitor has the legal duty:

> "...to exercise reasonable care to protect invitees from unreasonable risk of harm caused by a dangerous condition of the land that the landowner knows or should have known the invitees will not discover, realize, or protect themselves against."

The *Bertrand* Court reaffirmed the principle that where a condition is "open and obvious" the possessor has no absolute duty to warn of the condition and liability does not attach. The Court adopted the following language from 2 Restatement of Torts, § 343, 343A:

> "If a particular activity condition creates risk of harm only because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine cuts off liability if the invitee should have discovered the condition and realized its danger, but if the risk remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the invitor maybe required to undertake reasonable precautions."

According to the Court, it is axiomatic that the duty of an invitor is to protect invitees from *unreasonable* risks of harm, not the inherent potential for injury that is endemic with all things, activities and conditions. Though the owner or possessor of the premises may have a duty to invitees to exercise reasonable care, they are not "...absolute insurers of the safety of their invitees." Injury causing accidents may occur for which the owner bears no responsibility to an invitee. Consequently, most invitees are expected to be primarily responsible for their own safety and most common conditions are generally held to be open and obvious such that tripping, slipping or falling does not create liability. Stated another way: Invitees have no claim if the injury-causing condition presented a *reasonable* risk of harm. There must be something special, or "unique" about the condition that can be identified such that it constitutes an unreasonably dangerous condition despite its open and obvious nature. The *Bertrand* court stated it as follows:

> "In summary, because steps are the type of everyday occurrence that people encounter, under most circumstances, a reasonably prudent person will look where he is going, will observe the steps, and will take appropriate care for his own safety. Under ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps "foolproof." Therefore, the risk of harm is not unreasonable. However, where there is something unusual about the steps, because of their "character, location, or surrounding conditions," then the duty of the possessor of land to exercise reasonable care remains." [Emphasis added].

Subsequent holdings have refined the *Bertrand* Court's language by use of the phrase "special aspects."

A premises owner does not owe a duty to protect invitees from an unreasonable risk that cannot be, or is not, reasonably to be anticipated by a defendant. *Butler v Ramco-Gershenson, Inc.*, 214 Mich App 521; 542 NW2d 912 (1995). *Riddle, supra* reviewed the development of Michigan law defining the relationship and duties owed by a possessor of land to an invitee. It is clear from the decision that the "open and obvious" doctrine is very broad. It generally extends to any activity or condition on land. Its language encompasses not only the duties to warn, but the duty to protect the invitee. The *Riddle* Court reaffirmed that:

> "...a possessor of land does not owe a duty to protect his invitees where conditions arise from which an unreasonable risk cannot be anticipated or of dangers that are so obvious and apparent that an invitee may be expected to discover them himself." [Emphasis added].

The Court further held that 2 Restatement Torts, 2d, § 343A(1), provides a fair statement of the law prevailing in Michigan concerning a premise owners liability and an invitee's knowledge of dangerous conditions:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." [Underlining added].
>
> * * *
>
> "If the plaintiff is a business invitee, the premises owner has a duty to exercise due care to protect the invitee from dangerous conditions. *Beals, supra.* However, where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee. *Williams, supra.* [underlining added].

The rule, as the Court stated, "...attacks the duty element that a plaintiff must establish in a *prima facie* negligence case" not the way in which the condition arose. If it is open and

obvious then the landowner, possessor or invitor has no duty to the invitee. Hence, there can be no breach of duty. Where there is no duty there can be no negligence. *Flones v Dalman*, 199 Mich App 396; 502 NW2d 725 (1993).

It is now well-established that a possessor of land with respect to invitees has a duty to "exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on land." *Lugo v Ameritech Corp., Inc.*, 464 Mich 512; 629 NW2d 384 (2001). When the condition, however, is open and obvious, the possessor will not be liable unless there exists some identifiable "special aspect" spawning an *unreasonable* risk of harm. The premises possessor or owner has a duty to warn of, or diminish unsafe conditions, only where the same is known or the condition is of such a character that the possessor should have known of its existence because it has existed for a sufficient length of time. *Prebenda v Tartaglia*, 245 Mich App 168; 627 NW2d 610 (2001); *Clark v Kmart*, 465 Mich 416; 634 NW2d 347 (2001).

Once a particular risk or danger is deemed to be open and obvious, the second level of inquiry is triggered. This Court in *Lugo* says there is:

> "...a high standard for determining what constitutes a 'special aspect'. Without the existence of a special aspect, an action premised on an open and obvious condition will be barred by the open and obvious doctrine."
>
> * * *
>
> "...only those *special aspects* which give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove the condition from the open and obvious danger."

Lugo seems to describe two forms of "special aspects". The Court explained by example: (1) When an "open and obvious" hazard exists at the only exit of a commercial building, and exiting the building would require an "invitee" to encounter the risk of harm *without any alternative*

(i.e., where the condition was "effectively unavoidable"), and (2) Where even an unavoidable "open and obvious" condition creates a risk of death or severe injury. *Id*, at 517-518. Nothing here comes close to meeting either test

It was Mr. Wiater's choice to use any route he wished to enter or exit the building. He had the choice of avoiding it all together by not leaving his vehicle. Nonetheless, it is difficult to concluded that the parking lot and the route taken, presented a high or unreasonable risk of severe injury when Mr. Wiater had, on numerous occasions, used the same parking lot and walkway during the winter months without incident for purpose of picking up Mr. LaVictor.

The Court of Appeals identified no "special aspect" to allow Plaintiff to avoid the application of the "open and obvious" doctrine. The sense of decision is that there was a fact issue as to whether or not such "special aspects" existed because the route was unavoidable. But the Court identified nothing other than ice on the lot that would meet the "high standard" established by the Supreme Court in *Lugo* for "special aspect." Nor did the Plaintiff offer such in evidence. What the Court of Appeals did was reject assertions that Mr. Wiater did not have to park where he parked, did not have to leave his vehicle to pick up Mr. LaVictor nor take the route he used.

The Court of Appeals does say that Defendant made the "parking lot available specifically as a place where a visitor could park." This is true and applicable to every parking lot and parking area in the State of Michigan. By all accounts, the only condition which is the focus of this action is the icy nature of the parking lot. The "special aspect" must be related to that hazard and the Court of Appeals says it may have been "effectively unavoidable." Followed to its natural conclusion, then, the decision means that <u>every</u> icy parking lot in winter is effectively unavoidable and hence a question of special aspect, avoiding Summary Disposition

and the Open and Obvious doctrine arises. This is contrary to *Lugo*. The concept of "effectively unavoidable" is a trap, compelling one to cross an unnecessarily dangerous hazard to exit a building. In this case we have a willful choice of crossing or not crossing ice to get to the building. If this case is a "trap" then the same must be said of every parking area. Furthermore, this conclusion runs contrary to the Court of Appeals' decision in *Joyce v Ruben*, 249 Mich App 231; 642 NW2d 360 (2002). That case confirms snow and ice do not present a uniquely high risk, but in fact are common, prevalent and expected condition for which human beings are conversant on an everyday basis during winter months. For that reason it can not be said to be "unavoidable" or presenting a severe risk of harm.

The Court of Appeals went on to state that "it should have been apparent to Defendant that invitees who parked in the parking lot could not safely do so." How is this true? No explanation is offered. The Court merely assumes that the parking lot was not reasonably safe without pointing to some high degree risk of harm arising from a "special aspect." And it further assumed Defendant knew, or should have known, of the "special aspect" compelling mitigation. But the Court fails to recite from whence this evidence comes. Rather, we are merely referring to Mr. LaVictor's testimony that he would normally salt the parking area in the morning but could not because there was no salt. This supposedly supplies proof that the Defendant knew or should have known of the icy condition. However, all assertions by Mr. LaVictor are disputed and those disputes supported by documentation and affidavits. [Exhibit E]. In any case, this is entirely a collateral factual dispute. The primary point is the implication established by the Court of Appeals that any parking lot with an icy surface during winter months is a "special aspect" if not immediately ameliorated by the application of salt. This is a substantial deviation from several years of developing Michigan law. It effectively eliminates application of the Open and

Obvious doctrine to icy parking lots. Even though in the present case, other than the fact that the parking lot was "clear ice" and "flat," neither the Court of Appeals nor for that matter Plaintiff and his witness provide anything odd, unusual or unique enhancing risk beyond that expected from any other similar parking area. Mr. LaVictor testified the icy condition was a consequence of natural melting and freezing overnight. And, no testimony credits the contention that Defendant, its staff, employees or clients had any hand in altering the condition to increase risk. The only thing done to the parking lot was snow plowing a few hours prior to this incident.

With what are we left? Other than the asserted unavoidable route, the Court of Appeals' proposition is that clear ice on any parking lot in the state of Michigan during the winter, though open and obvious, and caused by natural melting and freezing, on all occasions creates a fact issue of "special aspect." The Court failed to distinguish this parking lot in any manner as different from all others. The fact is, however, there is no effective difference between this parking lot and any other that may be slippery in the winter for those who choice to use it. And in this case, it was a natural condition as opposed to one created or maintained by some identifiable negligence. *Corey v Davenport College of Business*, 251 Mich App 1; 649 NW2d 392 (2002)*; Joyce, supra.* The "special aspect" does not appear to be so special. Snow and icy parking lots are the prevailing condition during a number of months in the winter, particularly in the Upper Peninsula. Even salting the parking lot may create a worse hazard by mixing ice with water over the top of a slippery surface.

c. Snow and Ice

Traditionally, under Michigan law, a landowner or private landowner owed no duty to a licensee to remove the natural accumulation of ice or snow from any location. *Hampton v Master Products, Inc.*, 84 Mich App 767; 270 NW2d 514 (1978). *Zielinski v Szokola*, 167 Mich

App 611; 423 NW2d 289 (1988). The appellate courts disdained holding a landowner responsible for melting and freezing of ice or snow as a direct consequence of salting or sanding that would alter the natural accumulation. *Zielinski, supra.* If a landowner took no action to alter the natural accumulation, he could not be held liable by a licensee for any injury the consequence of such inaction and the natural accumulation of snow or ice. *Taylor v Saxton*, 133 Mich App 302; 349 NW2d 165 (1984):

> "The general rule with regard to the liability of a municipality or property owner for injuries sustained by a licensee as a result of icy conditions as stated in a doctrine known as the natural accumulation doctrine. The doctrine provides that neither a municipality nor a landowner has an obligation to a licensee to remove the natural accumulation of ice or snow from any location. [Citations excluded]." *Ziekinski, supra.*

This Rule does not apply to invitees who are privileged to demand a higher standard of care by property owners, possessors, and businesses. *Zielinski, supra.* As to invitees, the Michigan Supreme Court decision in *Quinlivan v Great Atlantic & Pacific Tea Co., Inc.*, 395 Mich 244; 235 NW2d 732 (1975), defined landowners' duties. That decision and holding was further refined by the revitalization of the open and obvious doctrine. *Riddle, supra.* See also *Stitt, supra.* .

The applicability of the natural accumulation doctrine has been thrown into some confusion by a split Court of Appeals decision in *Altairi v Alhaj*, 235 Mich App 626; 599 NW2d 537 (1999). The majority contended that the doctrine never applied in Michigan as immunity from liability to private landowners in suits by licensees. Language to the contrary in a number of cases was dismissed as something akin to a scrivener's error. The Court majority, therefore, asserted it was merely clarifying or refining that which always existed. The dissent, in a vigorous rebuttal, accused the majority of attempting to overrule years of precedence and the clear import of prior holdings. To obscure the issue further, the Court affirmed Summary

Disposition on another basis, rendering their discussion (holding?) on the Natural Accumulation Rule *dicta*. Resolution by this Court of the Natural Accumulation Rule and its viability would have a direct bearing on present Plaintiffs' cause of action if he was in fact a licensee.

The present Court of Appeal' decision in this case seems to vary from prior and more recent holdings concerning liability arising out of falls involving snow and ice. The prevailing "general rule" is that such hazards are open and obvious and do not impose a duty on the property owner to either warn or remove the hazard unless some "special circumstance" is proven. *Corey, supra.* Snow or ice-covered walkways are an "open and obvious condition" that do not subject landowner or possessor to liability short of a "special aspect" substantially enhancing the danger and causing the injury. *Joyce, supra.* The Court in *Corey*, following the decision in *Joyce*, expressed the standard in determining whether or not the condition is open and obvious:

> "The test to determine if a danger is open and obvious is whether an average user with ordinary intelligence (would) have been able to discover the danger and the risk presented upon casual inspection." See also *Novotney v Burger King Corp.*, (on remand) 198 Mich App 470; 499 NW2d 379 (1993).

This is an objective test. The Court looks "not to whether plaintiff should have known the condition was hazardous, but to whether a reasonable person in his position would foresee the danger." *Joyce, supra.*

The threshold for liability here is well above those conditions human beings normally, routinely and customarily encounter in their daily lives. As a matter of law, the Court in *Joyce* held that snow or ice on a walkway does not create a risk or death or severe injury in the normal course of matters that would bring it within "special aspects" exception. The *Joyce* case involved a "slip and fall" on ice or snow on a sidewalk. Plaintiff's complaint there was that

Ruben was negligent in failing to remove that snow and ice. Defendant moved for Summary Disposition based upon the "open and obvious" doctrine. The Court of Appeals affirmed stating:

> "Her testimony establishes beyond peradventure that she saw the snow *and* recognized that the snow posed a safety hazard to her...Under similar circumstanced, an average person with ordinary intelligence would not only have seen the snowy condition of the sidewalk, but would have discovered the risk of slipping on it. Thus, subjectively and objectively, no reasonable juror could have concluded that the condition of the sidewalk and the danger it presented was not open and obvious. [Citations omitted]. Accordingly, the trial court properly concluded that the condition was open and obvious. [Citations omitted]."

The *Corey* case involved a "slip and fall" on snowy and icy steps located outside one of Defendant's dormitories. The Court of Appeals had reversed the Trial Court's grant of Summary Disposition for the Defendant, the Supreme Court remanded the case back to the Court of Appeals for reconsideration in light of *Lugo, supra* and *Joyce, supra*. Upon reconsideration, the Court vacated its earlier opinion and affirmed the Trial Court's grant of Summary Disposition in favor of Defendant. In so ruling, the Court observed the following:

> The analysis and conclusion in *Joyce, supra* are applicable to the instant Plaintiff. Plaintiff is a reasonable person who recognized the snow and icy condition of the steps and the danger of the condition presented. Thus, we also conclude that the condition was open and obvious in the present case...
>
> In applying *Lugo* and *Joyce* to the present case, we conclude that the slippery steps at issue here were not only an open and obvious condition, but also there are no "special aspects" of the steps that create a "uniquely high likelihood of harm or severity of harm" if the risk is not avoided...

In the present case, the Court of Appeals found the condition to be "open and obvious." The Court's conclusion that "special aspects" was a fact issue, however, does not comport with the line of decisions discussed above involving snow and ice. The condition is ubiquitous; it is not an unavoidable trap or high order of potential harm on the level of death or severe injury in contrast to all other common parking lots with the same condition. There is nothing that should have taken these facts outside the application of the "open and obvious" doctrine.

IV.

CONCLUSION

The injury-causing condition encountered by Mr. Wiater is unknown since he has no recollection of how or why he fell. He cannot supply the critical element of proximate cause. *Stefan, supra.* Plaintiff's companion, Lynn LaVictor, does not advance this issue with any certainty. He did not see Plaintiff fall nor can he recount by observation the cause for the fall. He does speculate that it was the ice or slippery surface, but he does not know since all he saw was Mr. Wiater's arms go up as he disappeared on the other side of the van. Mr. Wiater could have lost his balance in opening the door.

If we assume that the fall was induced by ice in the parking lot, which is a reasonable, there still remain insurmountable obstacles to liability. First and foremost is the fact that the condition was open and obvious. In addition to the lack of the proximate cause element, no duty or breach of duty exists. Neither Mr. Wiater nor Mr. LaVictor offered, after repeated inducements on questioning, anything "odd or unusual" concerning the parking lot outside of the icy condition that would supply a "special aspect." Neither Plaintiff nor his witness, Mr. LaVictor, suggest that some condition entailing a severe risk was undetectable, unrecognizable or unavoidable. Although Mr. Wiater conveys no information concerning ice or snow (except to say there was "snow and ice all over" at that time of the year), his companion says that the surface was "clear ice." What Mr. LaVictor expresses is the objective observation that the condition was, in fact, open, obvious and observable.

Mr. Wiater had already transversed the same course minutes before. This was one of many visits to GLR during the winter of 2000-2001 without incident. There was nothing hidden or concealed about the condition that would impose a duty upon Defendant if Plaintiff was a

licensee. There were no "special aspects" allowing an exception if he was an invitee. Snow and ice, as Mr. Wiater himself commented, was the ubiquitous and prevailing condition of parking lots in the city of Marquette during that time of year.

This is not a true unavoidable danger case. The examples offered by the Appellate panels indicate that it is in essence a trap where a reasonable human being is compelled to cross an area of unreasonable risk or severe danger to get out of a building. *Lugo, supra.* Plaintiff chose where to park and to leave his vehicle. The dangerous condition over which a plaintiff may be forced to use, by one means or another, must constitute an enhanced risk beyond that that the courts have already concluded are reasonable and expected conditions such as open and obvious snow and ice. In any case, Plaintiff was not an invitee, responding to an invitation to visit for a commercial purpose.

In sum, the Plaintiff had a failure of proof on the essential elements of a negligence claim. Plaintiff is not an invitee due a high standard of care. As a licensee, the only duty owed is to warn of a hidden danger which Defendant knows or has reason to know. *Stitt, supra.* Plaintiff has neither pled nor produced evidence of a hidden danger. The "icy" parking lot was not such a condition, it was an "open and obvious." Even the recent decision in *Altairi*, despite the potential revision of the Natural Accumulation Doctrine with reference to licensees, concedes that the residual obligation and hence liability in cases involving slips and falls on ice or snow is marginal. As a matter of fact, the Court found against plaintiff on the "knowledge" element and held:

> "While we find that plaintiff's claim is not barred by the natural accumulation doctrine, plaintiff has failed to show that there is a genuine issue of material fact concerning whether defendant knew, or had reason to know, that there was ice under the snow. It is difficult to imagine, under the restatement formulation of a landowner's duty to a licensee, the actual circumstances in which a possessor would be liable to his licensee for a slip and fall because of naturally accumulated

ice and snow. The proper inquiry focuses on the parties' knowledge of the danger. In a comment to restatement, § 342, p. 210, the drafter's note that 'knowledge' implies not only knowledge of the dangerous condition, but also that the 'chance of harm and the gravity of the threatened harm are appreciated.' However, if a danger is open and obvious, the need to warn is obviated. *White, supra*, at 437, 505 NW2d 8. Therefore, a possessor of land must either know of the danger or have reason to know of the danger, but the danger cannot be open and obvious -- a very narrow class of risk given the usually obvious nature of any hazards stemming from naturally accumulated ice and snow. Any danger that is not obvious is not likely to be known to the landowner." [Underlining added].

This finding and analysis is equally and forcibly applicable here. The Plaintiff has failed to enunciate and identify a hidden danger causing his injury and has further failed to show that the Defendant knew or should have known of that concealed hazard knowing the gravity of risk to Plaintiff as a licensee.

V.

REQUEST FOR RELIEF

WHEREFORE, this Defendant/Appellant and Applicant, Great Lakes Recovery Centers, request this Court grant leave, and upon hearing this Appeal, reverse the decision of the Court of Appeals and reinstate the Order and Judgment of the Trial Court granting Summary Disposition.

Respectfully Submitted,

BENSINGER, COTANT & MENKES, P.C.

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Michael G. Summers (27241)
Attorney for Defendant/Appellant
122 W. Bluff Street
Marquette, MI 49855
(906) 225-1000